85-647

No. 84-1300

Supreme Court, U.S.
FILED
OCT 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

RICHARD M. MANN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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110

I

QUESTION PRESENTED FOR REVIEW

May the Internal Revenue Service issue summonses for the primary purpose of gathering evidence for use in non-tax criminal prosecutions, including, postal violations, wire frauds, narcotics distribution, and racketeer influenced and corrupt organizations, if it is also, in part, pursuing a criminal tax investigation?

TOPICAL INDEX

	Page
Question Presented for Review	i
Table of Authorities	iii
OPINION BELOW	2
JURISDICTION	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	13
THE DECISION BELOW IS FUNDAMENTALLY WRONG AND REFLECTS AN URGENT NEED FOR THE COURT TO CLARIFY THE PRINCIPLES INVOLVED IN THIS CASE	13
A. The Internal Revenue Service May Not Issue Summonses For The Purpose Of Gathering Information For Use In **Non-Tax** Criminal Prosecutions, Regardless Of The Status Of Tax Investigations.	13
CONCLUSION	23
APPENDICES	

TABLE OF AUTHORITIES

Cases	Page
Donaldson v. United States, 400 U.S. 517, 91 S.Ct. 534 (1971)	14
Reisman v. Caplin, 375 U.S. 440, 84 S.Ct. 508 (1964)	15
United States v. Chase Manhattan Bank, 598 F.2d 321 (2nd Cir. 1979)	17
United States v. Chemical Bank 593 F.2d 451 (2nd Cir. 1979)	17
United States v. LaSalle Nat'l. Bank, 437 U.S. 298, 98 S.Ct. 2357 (1978)	13, 14, 15 23, 25
United States v. Serubo, 604 F.2d 807 (3rd Cir. 1979)	17 22

Federal Rules and Statutes	
Federal Rules of Criminal Procedure, Rule 11(a)(2)	5
Title 26, United States Code, Section 7602	3, 13 14, 23, 25
Title 28, United States Code, Section 1254(1)	2

Miscellaneous

Internal Revenue Manual, §9211 20

NO. 84-1300

IN THE

SUPREME COURT

OF THE UNITED STATES

RICHARD M. MANN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

The petitioner, RICHARD M. MANN, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on August 20, 1985.

OPINION BELOW

The opinion of the Court of Appeals, affirming that of the United States District Court for the District of Nevada, which adopted the findings and recommendations of the United States Magistrate, is attached hereto as Appendix A; a copy of the opinion of the District Court is attached as Appendix B; copies of the findings and recommendations of the United States Magistrate are attached hereto as Appendix C.

JURISDICTION

The judgment of the Court of Appeals of the Ninth Circuit was entered on August 20, 1985. Jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

26 United States Code §7602,

Examination of Books and Witnesses:

> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized--
>
> (1) To examine any books, papers, records or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary

or his delegate at a time and place named in summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

STATEMENT OF THE CASE

The defendant was indicted in the District Court of the District of Nevada for three counts of income tax evasion for the years 1977, 1978, and 1979. The defendant moved to dismiss the indictment on the grounds that, inter alia, the indictment was obtained through the presentation of evidence garnered through the use of administrative summonses issued in bad faith to develop evidence for use in non-tax criminal prosecutions. In

connection with his motion to dismiss the indictment, the defendant also moved to suppress all evidence garnered through the use of administrative summonses issued by the Internal Revenue Service. The defendant's motion with respect to the Internal Revenue Service summonses was denied and a three count superseding information was filed charging the defendant with failure to file federal income tax returns for the 1977 and 1979 calendar years, and evasion of federal income taxes for the 1978 calendar year.

Defendant entered a plea of guilty to each count upon a conditional plea arrangement pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure. As

part of the conditional plea of guilty, defendant reserved in writing the issues upon which review is now being sought.

The criminal investigation of the defendant, Richard M. Mann, had its genesis in the established criminal investigation of his employer, Fifty States Distributing Company ("Fifty States"). (App. D, Government's Opposition to Defendant's Motion to Dismiss Indictment, Affidavit of Dennis R. Barton, Exhibits A and B,[1] App. E; App. F; R.T. 6, passim).

The investigation of Fifty States, although conducted by special agents of the Internal Revenue Service ("I.R.S."),

---

[1] Exhibits A and B to the Government's Opposition to Defendant's Motion to Dismiss Indictment are reproduced at Appendices E and F respectfively.

concentrated on the unveiling of any violation of "any federal criminal statute." (R.T. 53; App. E). With this in mind, the special agents served summonses upon Fifty States (R.T. 6, 53). The summonses were served in both in respect of William Barnett and in respect of Fifty States. (App. F, Q. 43; R.T. 24, 43, passim). At that time, the defendant was known to the Internal Revenue Service as William Barnett. (R.T. 9, 29, 44, passim). The scope of the investigation was firmly delineated by an institutional memorandum from Hugh B. Mays, Special Agent, to the Chief, Criminal Investigation Division, Las Vegas, Nevada, which reads in relevant part, as follows:

Subject: Areas of Questioning

FIFTY STATES DISTRIBUTORS

The areas of consideration concerning the activities and operations of MAY DISTRIBUTING COMPANY, INC. d/b/a FIFTY STATES DISTRIBUTORS would include but not be limited to the following:

1. Importation of narcotics

    a. Source of narcotics
    b. Distribution of narcotics
    c. Proceeds of narcotics transactions
    d. Individuals involved

2. Sales via telephones

    a. The general operation
    b. How returned sales are disposed of
    c. Possible postal violations

3. Was there an income tax conspiracy?
   Who masterminded scheme?

    a. Use of fictitious name
    b. Use of fictitious social security numbers
    c. Issuance of Forms 1099 and W-2
    d. Withholding of taxes vs. larger paychecks for salespeople

4. Fraud by wire (telephone)

    a. Indications of facts concerning fraud by wire
    b. Who commits this fraud
    c. Who gives instructions for this fraud by wire

5. Organized Crime Connections

    a. How connected
    b. Where are connections
    c. Who are connections

6. FIFTY STATES operations including other states

    a. Locations
    b. Operators
    c. What SCHROEDER receives; is this in the form of skimmed receipts
    d. How are books and records consolidated into Las Vegas office

7. Information as to any SCHROEDER connection to Service employees. (App. E).

In support of the government's opposition to defendant's motion to dismiss the indictment, and in justification of the scope of the investigation, Special Agent Dennis R.

Barton submitted an Affidavit in which he stated his belief that Special Agents, "are obligated by our manual [the Internal Revenue manual] to pursue non-tax violations and provide that information to the agencies that have jurisdiction." (App. D, Affidavit of Dennis R. Barton, page 4). The extent of the Special Agents' commitment to their "obligation" is recorded in App. F, Defendant's Question and Answer Statement of May 1, 1980 ("Q&A"):

> 31 Q. Operational-wise, do you know of anything he might be doing which is not consistent with postal regulations?
>
> ....
>
> 109. Q. We had one area we place in rather high esteem, **Number One on our list** that we wanted to look into. That

was the area of narcotics and the sub-area that we have listed on our letter. First of all, how available were drugs at FIFTY STATES during those three years, initially?

....

118. Q. Specifically, do you know of any sales managers who offered a "spiff" to independent salesmen of a gram of coke if they did a certain amount business?

....

122. Q. Before he left, would you know if he did or did not use cocaine?

....

141. Q. Do you have any knowledge of any ties SCHROEDER may have with any Organized Crime figures?

...

At this point are some direct questions which relate to him (the informant) but not his taxes...in the area of what we talked about on the phone this morning. (App. F).

The Magistrate apparently held that so long as I.R.S. is conducting a tax investigation, I.R.S. may pursue via summons evidence of the violation of any federal criminal statute. (App. C).

The matter was affirmed on appeal by the Ninth Circuit on the theory that so long as I.R.S. has not abandoned its pursuit of a civil tax determination, it may pursue via summons evidence of the violation of any federal criminal statute. (App. A).

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS FUNDAMENTALLY WRONG AND REFLECTS AN URGENT NEED FOR THE COURT TO CLARIFY THE PRINCIPLES INVOLVES IN THIS CASE:

A. The Internal Revenue Service May Not Issue Summonses For The Purpose Of Gathering Information For Use In Non-Tax Criminal Prosecutions, Regardless Of The Status Of Tax Investigations.

The Supreme Court in the United States v. LaSalle Nat'l. Bank, 437 U.S. 298, 98 S.Ct. 2357 (1978), established several requirements for the issuance of a valid summons by the I.R.S. under I.R.C. §7602. First, the summons must be issued before the I.R.S. makes a criminal referral recommendation for prosecution to the Department of Justice. 437 U.S. at 318, 98 S.Ct. 2368. In addition, and more importantly, the

I.R.S. is required to use its summons authority "in good faith pursuit of the congressionally authorized purposes of I.R.C. §7602." Id.

The authority granted the Service with respect to the issuance of summonses is to be used for its tax determination and collection functions, and (as of September 4, 1982) may be used to inquire into offenses under the Internal Revenue laws. It is not to be used in derogation of the Grand Jury's investigative functions, to aid the Justice Department in prosecuting criminal cases, or to gather information for any other government agency. LaSalle, supra; Donaldson v. United States, 400 U.S. 517, 91 S.Ct. 534 (1971); Reisman v.

Caplin, 375 U.S. 440, 84 S.Ct. 508 (1964).

The LaSalle opinion recognized that, of course, tax conduct which can support criminal prosecution will almost inevitably be the basis for civil penalties as well. The Court, conceding that the "government does not sacrifice its interest in unpaid taxes just because a criminal prosecution begins," 437 U.S. at 311-12; 98 S.Ct. at 2365, reasoned that the recommendation for a criminal prosecution should serve as a cut-off, however, on prophylactic grounds. "Only at that point do that criminal and civil aspects of a tax fraud case begin to diverge." Id. The majority went on to hold, nevertheless, that there were some unusual circumstances

when even before a recommendation for prosecution a summons might be held invalid. As illustrated in the opinion, these unusual circumstances would be present if a recommendation were delayed for the purpose of gathering further evidence for the prosecution of the offense, or when I.R.S. acts as an information gathering agency for other departments of the government, regardless of the status of criminal cases:

> Similarly, the good faith standard will not permit the I.R.S. to become an information gathering agency for other departments, including the Department of Justice, regardless of the status of criminal cases.

437 U.S. at 316-17; 98 S.Ct. at 2367-68. (emphasis supplied). Accord United States v. Serubo, 604 F.2d 807 (3rd Cir. 1979); United States v. Chase Manhattan Bank, 598 F.2d 321 (2nd Cir. 1979); United States v. Chemical Bank, 593 F.2d 451 (2nd Cir. 1979).

The above-referenced limitations on the issuance of summonses relate only to the conduct of the I.R.S. in its "institutional posture," 437 U.S at 316; 98 S.Ct. at 2367, not to the subjective intent of the examining agents. The institutional posture in this matter manifests itself in Appendix E - the Memorandum from Special Agent Mays to the Chief, Criminal Investigation Division, who, obviously, allowed or encouraged the investigation to continue.

The record is clear, these Special Agents were prepared to investigate and interrogate on a whole panoply of crime, "any federal criminal statute," whether or not it had a revenue component, and they did! Summonses were issued to Fifty States for the purposes of exploring narcotics distribution, postal violations, wire fraud and organized crime. This unseeming use of the summons power is highlighted by the state of mind of Special Agent Barton, who believed, and still believes, that special agents "are obligated" by [the Internal Revenue manual] to pursue **non-tax** violations and provide that information to the agencies that have jurisdiction. (App. D, Affidavit of Dennis R. Barton). It is also

highlighted by the Q&A of defendant MANN:

> Special Agent Mays: At this point are some direct questions which relate to him (the informant) **but not his taxes**...in the area of what we talked about on the phone this morning. (App. F, page 13).
>
> Special Agent Barton: We had one area we placed in rather high esteem, **Number One** on our list that we wanted to look into. That was the area of narcotics, and the sub-area that we have listed on our letter. First of all, how available were drugs at Fifty States during those years, initially? (App. F, Q. 109).

At the District Court hearing, the Government asserted that each of the crimes investigated by the Special Agents had a revenue component. With all due respect, that is not the point. A close reading of Exhibit B, as does the testimony at hearing, demonstrates beyond doubt that these agents were pursuing any crime that might present

itself. They even trespassed upon the investigative jurisdiction of the Internal Security Division of Inspection, within their own agency. (App. E; App. F, Q. 66 thru 83; R.T. 58). Even when Internal Security violations have a revenue component, Special Agents are forbidden from inquiring into the facts and circumstances surrounding the violations. (I.R.M. §9211, App. G).

Moreover, there were any doubt regarding the thrust of the Special Agents' examination, we would note that some time after the Q&A, the United States Postal authorities undertook a separate investigation of Fifty States Distributing Co. which "necessitated a delay in bringing the indictment against the defendant." (App. D). More signi-

ficantly, twenty-six days after defendant's conviction the government indicted Ronald Schroeder, the principal of Fifty States Distributing Co., for mail fraud and other non-tax violations. (App. H). Is there any doubt that the results of agents Mays' and Barton's investigation was turned over to the Postal Authorities? Significantly, there is no allegation that any tax indictment has ever been brought against Fifty States.

The lower courts' findings fail to distinguish between the "absence of civil purpose" form of abuse and the "information-gathering" form of abuse of the I.R.S. summons power. The latter form of abuse was clearly present during the special agents'

investigation of defendant because evidence was being sought for later utilization, and apparently was utilized, in other government agencies' criminal prosecutions. Thus, this court should clarify the applicable principles of law and reverse the opinion of the Court of Appeals, and require the suppression of all evidence garnered through the issuance of Internal Revenue Service summonses in this case. See United States v. Serubo, 604 F.2d 807, (3rd Cir. 1979) (Suppression is the appropriate remedy to accommodate the statutory policy of confining Internal Revenue Service summonses to authorized purposes).

CONCLUSION

"Nothing in §7602 or its legislative history suggests that Congress intended the summons authority to broaden the Justice Department's right of criminal litigation discovery or to infringe on the role of the grand jury as a principal tool of criminal accusation." United States v. LaSalle Nat'l. Bank, supra, 437 U.S. at 312, 98 S.Ct. at 2357. "Similarly, the good faith standard will not permit the I.R.S. to become an information-gathering agency for other departments, including the Department of Justice, regardless of the status of criminal cases. Id. at 317, 98 S.Ct. at 2368. The prophylactic enunciated and erected by this court in LaSalle will be eviscerated in the Ninth

Circuit should this court permit the decision of the Court of Appeals to stand. On the grounds that it could possibly raise revenue, special agents of the Internal Revenue Service can now investigate "any federal crime," including, for example, treason; because, you see, by selling government secrets, one can raise some money. So, if someone in the Silicon Valley decides to sell the secrets of this country, certainly, there should be a special agent of the Internal Revenue Service conducting a full scale investigation of such activities *via* the summons power, and the F.B.I. and C.I.A. can sit back and await the results of the investigation, without the necessity

of issuing search warrants, grand jury subpoenaes, or other procedural safeguards.

If the decision in LaSalle is to have any continuing prophylactic effect, surely, the use of the summons power in the manner presented in this case cannot be permitted to stand.

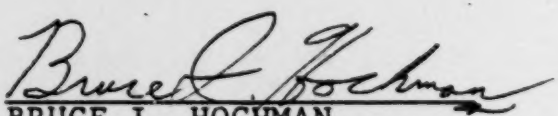
It is difficult, if not impossible, to envision a federal crime that does not potentially have some revenue impact. If the government wants to use its I.R.C. §7602 summons power, it cannot veer from the Congressional intent given it in its own parochial work. It's a special tool for a special purpose: The preservation of the revenue. On the other hand, it could be, but should not be, an intelligence

tool that leads to an untrammeled interference with the jurisdiction of the Drug Enforcement Administration, the Post Office, Federal Bureau of Investigation, and the Federal Grand Jury.

It is therefore respectfully suggested that the petition for writ of certiorari should be granted and the decision of the court below be reversed.

Respectfully submitted,

HOCHMAN, SALKIN & DeROY
A Professional Corporation



BRUCE I. HOCHMAN
Counsel for the Petitioner

JORDAN P. WEISS
OF COUNSEL

Dated: _____

APPENDIX A

FILED
Aug. 20, 1985
Phillip B. Winberry
Clerk, U.S. Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NITED STATES OF AMERICA,	CA No. 84-1300
PLAINTIFF/APPELLEE,	DC No. 84-54-01
VS.	
ICHARD M. MANN,	MEMORANDUM*
DEFENDANT/APPELLANT.	

Appeal from the
United States District Court
for the District of Nevada
Honorable Harry E. Claiborne,
District Judge, Presiding
Argued and Submitted April 8, 1985 -
San Francisco, California

EFORE: MERRILL, CANBY AND NORRIS,
CIRCUIT JUDGES.

Richard M. Mann, a/k/a William Barnett,

ntered a conditional plea of guilty on two

The panel has concluded that the issues
resented by this appeal do not meet the
(continued)

counts of failure to file federal income tax returns in violation of 26 U.S.C. § 7203 and one count of tax evasion in violation of 26 U.S.C. § 7201. Mann contends that the indictment should have been dismissed on any of three grounds. First, he contends that the Internal Revenue Service used its civil summons power in bad faith to conduct a criminal investigation. Second, he contends that the IRS breached a cooperation agreement by recommending prosecution for tax fraud. Third, he contends that pre-indictment delay prejudiced his defense. We affirm his conviction.

---

*/ (continued)
standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit.

IRS has authority under section 7602 of the Internal Revenue Code to issue summonses for the purpose of ascertaining the correctness of any return, making a return where none has been made, determining tax liability or collecting any tax liability. 26 U.S.C. § 7602. In United States v. LaSalle National Bank, 437 U.S. 298 (1978), the Supreme Court articulated the requirements for enforcement of a section 7602 summons. First, the IRS must issue the summons before it recommends criminal prosecution to the Justice Department on a matter reasonably related to the subject matter of the summons. Second, the Service must use its summons power in the good-faith pursuit of a congressionally authorized purpose. Donaldson v. United States, 400 U.S. 517, 536 (1971). To do so, the Service must meet the United States v. Powell, 379 U.S. 48 (1964)

standards of good faith [1] and must not abandon, in an institutional sense, the pursuit of civil tax determination or collection. LaSalle at 318.

The LaSalle Court further indicated that bad faith may be shown when (1) the Service delays making a recomendation to prosecute, after it has made an institutional commitment to make the referral, because it wants to gather additional evidence, id. at 316-17 or when (2) the Service becomes an "information gathering agency for other departments." Id. at 317. Under the LaSalle facts, a special agent and still not abuse the civil

---

[1] In Powell, the Court said that to enforce a summons,

> [The Service] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed. . . . .
> 379 U.S. at 57-58.

summons power. See id. at 300 n.1.

We hold, under the LaSalle, test, that the IRS here did not act, in an institutional sense, in bad faith. Mann presented no evidence that the IRS abandoned its pursuit of civil tax determination and collection. The summonses issued to Mann's employer sought financial information related to Mann's tax liability. That information was used to indict him. Mann, not the IRS, initiated the discussion of collateral crimes. Because we find no evidence that the IRS delayed recommending prosecution in order to gather additional information or used its summons power to gather information for another agency, we conclude that the IRS did not abuse its civil summons power.

We also conclude that the district court's finding that the IRS did not enter an agreement to refrain from recommending

prosecution is not clearly erroneous. See United States v. Carrillo, 709 F.2d 35 (9th Cir. 1983). The record contains ample evidence that Mann was not promised a grant of immunity in exchange for his agreement to meet with IRS agents.

We also reject Mann's contention that pre-indictment delay prejudiced his defense because witnesses were unable to recall when Mann revealed his true identity. We consider three factors in determining whether a pre-indictment delay denied the defendant due process: (1) the actual prejudice caused to the defendant; (2) the length of the delay and (3) the reason for the delay. United States v. Mays, 549 F.2d 670, 677-78 (9th Cir. 1977). We only need to consider the first factor because the defendant must show actual prejudice to prevail on a due process claim and defendant is unable to show prejudice. United States v. Cederquist,

641 F.2d 1347, 1351 (9th Cir. 1981). The only prejudice Mann claimed was the inability to prove that he revealed his true identity at the May 1 meeting. Even if it is assumed for purposes of argument that this inability would constitute prejudice, Mann has not shown how the witnesses' testimony would have helped him to prove that he had revealed his true identity at the May 1 meeting. See Mays, 549 F.2d at 677 & n.12. Mann therefore has not shown that any loss of evidence "Impaired his ability to meaningfully defend himself." Cederquist, 641 F.2d at 1351.

AFFIRMED.

APPENDIX B

ENTERED
Jul 19, 1984
Clerk, U.S. District Court
District of Nevada
By /s/ Deputy
Karla Winters

DISTRICT OF NEVADA
LAS VEGAS, NEVADA

UNITED STATES OF AMERICA, Plaintiff, vs. RICHARD M. MANN, a/k/a William Barnett, Defendant(s).	)	Criminal-LV 84-54, HEC
	)	MINUTES OF THE COURT
	)	Dated: July 18, 1984

PRESENT:
THE HONORABLE ROGER D. FOLEY
UNITED STATES DISTRICT JUDGE

DEPUTY CLERK: PRESTON BLUIETT, JR.

REPORTER: NONE APPEARING

U. S. ATTORNEY BY: NONE APPEARING

COUNSEL FOR DEFENDANT(S): NONE APPEARING

DEFENDANT(S) IS/ARE NOT PRESENT:

MINUTE ORDER IN CHAMBERS XXXX

IN COURT PROCEEDINGS:

There being no objections filed, the findings and recommendations of the United States magistrate (#22 and 23), entered June 26, 1984, are approved and adopted; therefore,

IT IS ORDERED that: 1) The Defendant's Motion to Dismiss Indictment under Rule 12(b) of the Federal Rules of Criminal Procedure (#12), filed May 11, 1984, is denied; and 2) The Defendant's Motion to Suppress Immunized Statements of the Defendant and Evidence Garnered through Institutional Bad Faith Internal Revenue Service Summonses (#11), filed May 11, 1984, is granted to the limited extent that statements made by Defendant to agents of the Internal Revenue Service at the interview conducted May 1, 1980, are suppressed. The motion is denied in all other respects.

CLERK, U.S. DISTRICT COURT

By: /s/ _____

APPENDIX C

ENTERED
JUNE 26 1984
CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY /s/ _____ DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA, Plaintiff, v. RICHARD M. MANN, aka William Barnett, Defendant.	) CR LV 84-54, HEC) FINDINGS AND RECOMMENDATION OF UNITED STATES MAGISTRATE) (Motion to Dismiss Indictment Under Rule 12(b) of the Federal Rules of Criminal Procedure No. 12)

On April 11, 1984, the Federal Grand Jury sitting at Las Vegas, Nevada, returned a three-count Indictment charging Defendant RICHARD M. MANN, aka William Barnett, with Attempt to Evade Income Taxes, in violation of Title 26, United States Code, Section 7201.

On May 11, 1984, Defendant RICHARD M. MANN filed a Motion to Dismiss Indictment Under Rule 12(b) of the Federal Rules of Criminal Procedure. Defendant MANN contends that the Indictment should be dismissed on the following grounds:

1. The Indictment was obtained in breach of an Internal Revenue Service agreement not to recommend prosecution;
2. The Indictment was obtained in breach of an Internal Revenue Service agreement not to use Defendant's statements against him;
3. The Indictment was obtained through the presentation of evidence garnered through the use of an administrative summons issued in bad faith and solely to develop evidence for

use in criminal prosecutions;

4. The Indictment was obtained after a period of prejudicial and unnecessary delay;

5. The special agents of the IRS charged with the investigation of Defendant MANN failed to comply with IRS guidelines promulgated to ensure a fair and impartial criminal investigation, and hence a fair and impartial presentation of the Federal Grand Jury;

6. Under the circumstances of this particular case, the Indictment must be dismissed either through the exercise of the Court's supervisory powers, or under due process of law.

The Government filed its Memorandum in Opposition to Motion to Dismiss Indictment

Under Rule 12(b) of the Federal Rules of Criminal Procedure on May 29, 1984. The Government argues there were no promises made to Defendant RICHARD M. MANN, implied or otherwise to the effect that Defendant MANN would not be prosecuted. Further, the Government denies bad faith by the IRS in the use of the summons in this case since the investigation was both criminal and civil under the guidelines of United States v. LaSalle national Bank, 437 U.S. 298 (1978). The Government also argues that the nineteen-month period between the Defendant of Justice's recommendation of prosecution and the bringing of the Indictment does not justify the dismissal of the instant Indictment. Finally, the Government contends that there was no breach of the directives of the Internal Revenue Service Manual and no circumstances which would therefore warrant a dismissal of the

Indictment.

On June 7, 1984, an evidentiary hearing was conducted before the undersigned Magistrate regarding Defendant's Motion.

Defendant testified that in January 1980 while employed at a company known as 50 States Distributing Company, and using the alias William Barnett, Defendant was advised by 50 States' General Manager David Richardson that IRS was conducting an investigation of 50 States and had subpoenaed certain records of Defendant. Defendant testified that he was advised by Mr. Richardson to obtain the services of an attorney and that Defendant thereafter retained David Spurlock, Esq., as his counsel.

Defendant testified that through his attorney, Spurlock, he arranged a meeting with IRS Special Agents Hugh Mays and Dennis Barton at which Defendant understood from Spurlock he was to obtain immunity from the

IRS and to answer questions regarding their investigation of 50 States Distributing Company. Defendant testified that the meeting with IRS Agents May and Barton occurred on May 1, 1980, at the offices of David Spurlock in Las Vegas.

Defendant testified that at the commencement of the May 1 meeting, the IRS Agents started to read Defendant his Miranda rights at which point Defendant and his attorney, Spurlock, objected to the advisement of Miranda rights because Defendant wanted to ensure that nothing he said to the IRS Agents could be used against him. Defendant testified that the interviewing agents advised him and his attorney that the agents could not grant immunity from prosecution at that time, and that any grants of formal immunity would have to proceed through the Justice Department. Defendant testified that with the

understanding that he would not be given Miranda warnings, and with the further understanding that the agents would take necessary steps to obtain a grant of immunity for him, Defendant consented to proceed with the interview which tracked an interview outline which had been previously provided to Defendant's attorney by Agents Mays and Barton.

Defendant further testified that during the May 1 interview the IRS Agents agreed not to discuss any criminal activities which involved Defendant and that although Defendant was prepared to cooperate further with the IRS Agents, he was never contacted for further interview after the May 1, 1980 meeting. Finally, Defendant testified that he identified himself by his true name, "Richard Mann" to the IRS Agents "off the record" during the May 1 meeting.

The Defense called as its second witness, David Spurlock, Esq. Mr. Spurlock testified that he met Defendant in January 1980 while Defendant was working for 50 States Distributing Company and that although he knew Defendant was using the fictitious name "William Barnett", he knew Defendant by his true name "Richard Mann".

Mr. Spurlock testified that Agents Mays and Barton had given him a copy of a proposed outline of questions to be put to Defendant during the May 1, 1980 interview. (Defendant's Exhibit A). Mr. Spurlock testified that he had no independent recollection of immunity being given to Defendant by the IRS Agents at the May 1, 1980 meeting although he did recall that the interview proceeded without Defendant MANN having been given his Miranda rights by the IRS Agents. Mr. Spurlock testified that the interviewing agents followed the format

of proposed questions contained in the interview outline (Defendant's Exhibit A) and that he did not recall Defendant identifying himself by his true name, "Richard Mann", during the May 1, 1980 interview. Mr. Spurlock further testified that he continued efforts to obtain a grant of immunity for Defendant but was unsuccessful in that regard as he understood the agents were not satisfied with the information provided by Defendant at the interview of May 1, 1980. Mr. Spurlock further testified that in his mind there had been no firm offer of immunity to Defendant prior to the May 1, 1980 meeting and that he had communicated this fact to Defendant prior to the interview.

At this point in the proceedings, United States Attorney Lamond Mills stated that the Government would stipulate to the suppression of all information provided by

Defendant MANN to agents of the IRS at the meeting conducted May 1, 1980, for reason that the interview was conducted without benefit of Miranda warnings.

The Defense called Special Agent Dennis R. Barton as its third witness. Agent Barton testified that he worked with former Special Agent Hugh Mays on an investigation of 50 States Distributing Company in late 1979 and early 1980. Agent Barton testified that he participated in the interview of Defendant on May 1, 1980. Agent Barton testified that he was familiar with the name "Richard Mann" prior to May 1, 1980, because his investigation of 50 States Distributing Company had revealed the issuance of payroll checks to a person by that name. However, Agent Barton testified that he did not know at the time of the May 1, 1980, meeting that the individual he was interviewing known as William Barnett, was in fact

RICHARD MANN.

The Defense called as its final witness, former Special Agent Hugh Mays. Agent Mays testified that he considered the meeting of May 1, 1980, to be an interview of a confidential informant named "Bill Barnett". Agent Mays testified that he recalled very clearly that Defendant did not identify himself as "Richard Mann" at any time during the interview of May 1, 1980.

Agent Mays testified that he and Agent Barton questioned Defendant regarding the areas identified in the outline contained in Defendant's Exhibit A to enable the IRS to investigate violations of Federal criminal statutes which involve some sort of income-producing scheme which would entail tax consequences. Agent Mays further testified that he was prepared at the time of the interview to discuss a full range of Federal crimes, even if they were outside

the scope of his investigation of 50 States Distributing Company. Finally, Agent Mays testified that he recognized the information provided by Defendant could not be used against him because the agents had not advised Defendant of his Miranda rights.

I.

DEFENDANT'S ALLEGATION THAT THE INDICTMENT WAS OBTAINED IN BREACH OF AN INTERNAL REVENUE SERVICE AGREEMENT NOT TO RECOMMEND PROSECUTION

Initially, Defendant MANN contends that the Indictment in the instant case was obtained in breach of an Internal Revenue Service agreement not to recommend prosecution. However, the testimony adduced at the hearing of June 7, 1984, is overwhelmingly contrary to Defendant's allegations.

Special Agents Barton and Mays both testified that Defendant MANN was not given

or promised any sort of immunity from prosecution. Defendant's former attorney, David Spurlock, also testified that Defendant MANN was not given or promised immunity and that his effort to secure a grant of immunity for Defendant were unsuccessful. Therefore, Defendant's argument in this regard must be rejected.

II.

DEFENDANT'S ALLEGATION THAT THE INDICTMENT WAS OBTAINED IN BREACH OF AN INTERNAL REVENUE SERVICE AGREEMENT NOT TO USE DEFENDANT'S STATEMENTS AGAINST HIM.

Defendant further argues that the return of the Indictment herein violates an agreement by the IRS not to use Defendant's statements of May 1, 1980, against him. Defendant's argument in this regard must be rejected.

The Government concedes and stipulates that because Defendant was not advised of his Miranda rights during the interview of

May 1, 1980, statements which he provided to IRS Agents at the time cannot be used against him. However, the record before the Court does not show that any statements given by Defendant MANN on May 1, 1980, were in fact used by the Government to obtain the Indictment herein.

The Court must reject Defendant's arguments that it was through the meeting of May 1, 1980, that the IRS Agents learned the true identity of Defendant as "Richard Mann". Defendant MANN himself is the only witness who testified that he identified himself as "Richard Mann" to the agents on May 1, 1980. The agents have testified that Defendant did not identify himself as "Richard Mann" on that date, and Defendant's former attorney cannot recall what occurred in this regard. The Court must find as more credible the testimony of the IRS Agents and therefore rejects Defendant MANN's

testimony that he identified himself by his true name at that interview.

III.

DEFENDANT'S ALLEGATION THAT THE INDICTMENT WAS OBTAINED THROUGH THE PRESENTATION OF EVIDENCE GARNERED THROUGH THE USE OF AN ADMINISTRATIVE SUMMONS ISSUED IN BAD FAITH AND SOLELY TO DEVELOP EVIDENCE FOR USE IN CRIMINAL PROSECUTIONS.

Defendant contends that the instant Indictment was obtained through the presentation of evidence garnered through the use of an administrative summons issued in bad faith and solely to develop evidence for use in criminal prosecutions.

For the reasons set forth in the Court's Findings and Recommendations of United States Magistrate filed this date regarding Defendant's Motion to Suppress Immunized Statements of the Defendant and Evidence Garnered Through Institution Bad Faith Internal Revenue Service Summons, Defendant's argument in this regard must be rejected.

In essence, the Court finds that the administrative summons issued by the IRS in this case were not issued in bad faith and solely to develop evidence for use in criminal prosecutions. Therefore, Defendant's argument that the Indictment herein should be dismissed because it was obtained through the presentation of evidence garnered through the use of administrative summons issued in bad faith and solely to develop evidence for use in criminal prosecution should be denied.

IV.

DEFENDANT'S ALLEGATIONS THAT THE INDICTMENT WAS OBTAINED AFTER A PERIOD OF PREJUDICIAL AND UNNECESSARY DELAY

Defendant next contends that the nineteen-month period between the Department of Justice's recommendation of prosecution and the bringing of the instant Indictment constitutes prejudicial pre-

Indictment delay which mandates dismissal of the Indictment.

In United States v. Marion, 404 U.S. 307 (1971), a delay of approximately three years existed between the time of the alleged offenses charged and the date of the Indictment. In that case, the Defendant claimed that the delay resulted from the negligence and indifference of the Government in investigating the case, and resulted in the Defendant's inability to remember many specific acts and conversations pertinent to the alleged offenses. The United States Supreme Court recognized that although applicable statutes of limitation primarily define the time limit within which charges must be brought, such statutes are not the exclusive means of defining a defendant's rights with respect to events that occur prior to an Indictment.

". . .the due process clause of the Fifth Amendment would require dismissal

> of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellee's rights to a fair trial and that the delay was an intentional devise to gain tactical advantage over the accused." Marion, supra, at 324.

See also: United States v. Lovasco, 431 U.S. 783 (1977).

In United States v. Mays, 549 F.2d 670 (9th Cir. 1977), the Ninth Circuit Court of Appeals set forth the "circumstances" which are to be balanced in determining whether pre-indictment delay in a particular case amounts to a denial of due process regarding dismissal of the indictment.

> "First of all, there must be some demonstration of actual prejudice resulting from the delay. Such prejudice will inevitably be either the loss of witnesses and/or physical evidence or the impairment of their use, e.g., dimming of the witnesses' memory. The burden of presenting such prejudice is on the defendant. (Citations omitted) To establish actual prejudice sufficient to warrant a dismissal, the defendant must show not only the loss of the witness and/or evidence

but also must demonstrate how that loss is prejudicial, (Citations omitted), the latter proof must be definite and not speculative: 'The assertion that a missing witness might have been useful does not show the "actual prejudice" required by Marion.' . . .A second element to be considered is the length of the delay. This aspect, however, must be weighted in conjunction with the third element -- the reason for the delay." Mays, supra, at 677-678.

The Court in Mays, supra, stressed that the presence of actual prejudice resulting from pre-indictment delay does not by itself warrant the dismissal of a criminal prosecution.

"The greater the length of the delay and the more substantial the actual prejudice to the defendant becomes, the greater the reasonableness and the necessity for the delay will have to be to balance out the prejudice. However, despite the degree of actual prejudice, for a judgment in favor of dismissal, there must be some culpability on the Government's part either in the form of intentional misconduct or negligence." Mays, supra, at 678.

Since Mays, supra, the Ninth Circuit has repeatedly held that pre-indictment

delay is permissible unless it violates "fundamental concepts of justice which lie at the base of our civil and political institutions." Arnold v. McCarthy, 566 F.2d 1377, 1381 (9th Cir., 1978); United States v. Walker, 601 F.2d 1051, 1056 (9th Cir. 1979); and United States v. Henry, 615 F.2d 1223, 1232 (9th Cir., 1980).

In United States v. Cederquist, 641 F.2d 1347, 1350-51 (9th Cir., 1981), the Ninth Circuit Court of Appeals reversed a District Court decision dismissing an indictment on the ground of pre-indictment delay of nearly five years where the District Court had determined that the defense had been prejudiced by the loss of certain documents evidence. The Court reversed on the ground that the Defendants had failed to establish that the loss of the documents in question actually impaired their ability to meaningfully present their defense. The Court stated:

A. Pre-Indictment Delay

In determiirg whether a due process violating pre-indictment delay has occurred, three factors must be considered: (1) the actual prejudice caused to the defendants, (2) the length of the delay, and (3) the reason for the delay. United States v. Mays, 549 F.2d 670, 677-678 (9th Cir., 1977). Actual prejudice must be shown by the defendant as it is a prerequisite to finding a due process violation. United States v. West, 607 F.2d 300, 304 (9th Cir. 1979).

Where the claim is that evidence has been lost due to the delay, the defendant must demonstrate by definite proof that the loss is prejudicial to him. Id. This means that a defendant must at least show that the loss of the witness or documentation "has actually impaired his ability meaningfully to defend himself." United States v. Fallan, 571 F.2d 497, 501 (9th Cir.), cert. denied, 436 U.S. 911, 98 S.Ct. 2249, 56 L.Ed.2d 411 (1978). Cederquist, supra, at 1350-51.

The Court having considered the pleadings on file herein and the arguments of counsel presented, the Court finds that Defendant has failed to offer evidence demonstrating actual prejudice suffered as

a result of the pre-indictment delay herein. Similarly, Defendant has failed to demonstrate culpability on the part of the Government in the form of intentional misconduct or negligence. Mays, supra, at 678. Therefore, Defendant's argument that a pre-indictment delay of nineteen months mandates dismissal of the instant Indictment must be rejected.

V.

DEFENDANT'S CONTENTIONS THAT SPECIAL AGENTS OF THE IRS CHARGED WITH THE INVESTIGATION OF DEFENDANT FAILED TO COMPLY WITH IRS GUIDELINES PROMULGATED TO ENSURE A FAIR AND IMPARTIAL CRIMINAL INVESTIGATION AND HENCE A FAIR AND IMPARTIAL PRESENTATION OF THE FEDERAL GRAND JURY

Defendant MANN argues that the Special Agents of the IRS charged with the investigation of Defendant failed to comply with the IRS guidelines promulgated to ensure a fair and impartial presentation to the Federal Grand Jury.

Specifically, Defendant contends there was a breach of the directives of the Internal Revenue Service Manual which warrants a dismissal of the instant Indictment since alleged offers of immunity had been made to the Defendant, and because the Defendant had not been read his Miranda rights.

However, as the Court has previously found, the record does not support Defendant's claim that an offer or promise of immunity was ever made to Defendant either prior to or after his interview on May 1, 1980. Further, although the record does support Defendant's claim that he was not given the Miranda rights prior to or during the interview of May 1, 1980, the record is equally clear that it was Defendant and Defendant's counsel who requested that he not be given Miranda rights. Further, the Government has already conceded and stipulated

that it will not use any of these statements made by Defendant during the interview of May 1, 1980, in connection with the prosecution of this case. Given the stipulated suppression of any statements made by Defendant at the interview of May 1, 1980, the Court must find Defendant's claim that the Indictment should also be dismissed to be without merit.

VI.

DEFENDANT'S ARGUMENT THAT UNDER THE CIRCUMSTANCES OF THIS CASE, THE INDICTMENT MUST BE DISMISSED EITHER THROUGH THE EXERCISE OF THE COURT'S SUPERVISORY POWERS OR UNDER DUE PROCESS OF LAW.

Finally, Defendant argues that whether considered separately or cumulatively, the prosecutorial behavior as outlined in Defendant's Motion amounts to a denial of Defendant's due process and mandates the dismissal of the Indictment herein.

However, for the reasons set forth in the Court's findings regarding each of Defendant's arguments above, the Court finds that there exists no clear basis in law and in fact to support a finding that Defendant's due process rights have been violated or which would support the Court's exercise of its supervisory powers to dismiss the Indictment herein. United States v. Ramirez, 710 F.2d 535, 541 (9th Cir. 1983); and United States v. Mitchell, 572 F.Supp. 709, 714 (N.D. CA, 1983).

RECOMMENDATION

Based upon the foregoing, it is the recommendation of the United States Magistrate for the District of Nevada that Defendant's Motion to Dismiss Indictment Under Rule 12(b) of the Federal Rules of Criminal Procedure be denied.

DATED: (June 26, 1984)

/s/
PHILLIP M. PRO
United States Magistrate

ENTERED
JUN 26 1984
CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY/s/ _____DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA, Plaintiff, v. RICHARD M. MANN, aka William Barnett, Defendant.	CR LV 84-85, HEC FINDINGS AND RECOMMENDATION OF UNITED STATES MAGISTRATE (Motion to Suppress Statements of the Defendant and Evidence Garnered Through Institutional Bad Faith IRS Summonses - No. 11)

On April 11, 1984, the Federal Grand Jury sitting at Las Vegas, Nevada, returned a three-count Indictment charging Defendant with Attempt to Evade Income Taxes in violation of Title 26, United States Code, Section 7201.

On May 11, 1984, Defendant filed a Motion to Suppress Immunized Statements of the Defendant and Evidence Garnered Through Institutional Bad Faith Internal Revenue Service Summonses. By his Motion, Defendant seeks to suppress from evidence all statements made by Defendant to the Government on May 1, 1980, and all evidence garnered through the use of administrative summonses issued by the Internal Revenue Service "in bad faith and solely to develop evidence for use in criminal prosecutions".

On May 29, 1984, the Government filed its Response in Opposition to Defendant's Motion in which the Government adopts its separate Response filed in opposition to Defendant's Motion to Dismiss Indictment Under Rule 12(b) of the Federal Rules of Criminal Procedure. (See Docket No. 14 and No. 15).

On June 7, 1984, an evidentiary hearing was conducted before the undersigned Magistrate regarding Defendant's Motion. The evidence adduced at said evidentiary hearing is summarized inthe Court's Findings and Recommendation filed this date in connection with Defendant's Motion to Dismiss Indictment Under Rule 12(b) of the Federal Rules of Criminal Procedure. The Court hereby incorporates that factual summary by reference in these Findings and Recommendation.

I.

To the extent Defendant's Motion seeks to suppress statements made by him to agents of the IRS at the interview conducted on May 1, 1980, the Government finds that Defendant's Motion should be granted.

As more fully discussed in the Court's Findings and Recommendation filed this date in connection with Defendant's Motion

to Dismiss Indictment, the Government stipulated in open Court at the evidentiary hearing conducted on June 7, 1984, that statements made by Defendant to IRS agents on May 1, 1980, should indeed be suppressed because Defendant was not advised of his Miranda rights prior to or during the interview of May 1, 1980. However, in making this finding, the Court specifically rejects Defendant's argument that his true identity as "Richard Mann" should also be suppressed. From the evidence adduced at the hearing conducted June 7, 1984, the Court finds that Defendant MANN did not identify himself by his true name, "Richard Mann", at the interview of May 1, 1980, but persisted in his identity as "William Barnett".

II.

Defendant also argues that any evidence gathered through the use of administrative

summonses issued by the IRS should be suppressed because said summonses were issued in bad faith and solely for the development of evidence for use in a criminal prosecution. However, the record before the Court does not support Defendant's argument.

Defendant relies heavily on United States v. LaSalle National Bank, 437 U.S. 298 (1978), to support his argument that the summonses in question were issued in bad faith.

It is clear from United States v. LaSalle, supra, and its predecessor, Donaldson v. United States, 400 U.S. 517 (1971), that as long as an IRS summons is issued in good faith pursuit of Congressionally authorized purposes, and prior to any recommendation to the Department of Justice for prosecution, it is enforceable. Donaldson v. United States, supra, at 536.

he Court in LaSalle recognized that investigations of potential violations of IRS laws may encompass enforcement of both civil and criminal statutes and further recognized the authority of a special agent of the IRS to issue an IRS summons in aid of a tax investigation with civil and criminal consequences. United States v. LaSalle, supra, at 308-309. Additionally, the Court recognized that the institutional responsibility of the IRS to collect civil fraud penalties and unreported taxes is not necessarily overturned by a single agent who attempts to build a criminal case. As the Court stated, although a special agent is an important actor in the process, "his motivation is hardly dispositive". United States v. LaSalle, supra, at 314-315.

Defendant argues that the IRS summons' authority does not exist to aid solely

criminal investigations and that Congressional purposes would be thwarted if the IRS abandoned in an "institutional" sense the pursuit of civil tax determination or collection. The Court agrees with this concept. However, the record before the Court simply does not support Defendant's allegation that the summonses in question were issued solely for the development of evidence for use in criminal prosecutions.

Indeed, the Court finds that at the time the summonses in question were issued, the investigation of Defendant must properly be characterized as a joint civil and criminal investigation. The record also demonstrates that no IRS summonses were issued after the investigation was referred to the Department of Justice for consideration of possible criminal prosecution. For all of the reasons above, Defendant's

argument that evidence obtained through use of IRS summonses should be suppressed must be rejected.

RECOMMENDATION

Based upon the foregoing, it is the recommendation of the United States Magistrate for the District of Nevada that Defendant's Motion to Suppress Immunized Statements of the Defendant and Evidence Garnered Through Institutional Bad Faith Internal Revenue Service Summonses should be granted to the limited extent that statements made by Defendant to agents of the IRS at the interview conducted May 1, 1980, should be suppressed.

It is the further recommendation of the united States Magistrate that Defendant's Motion to Suppress Immunized Statements of the Defendant and Evidence Garnered Through Institutional Bad Faith Internal

Revenue Service Summonses should be denied in all other respects.

DATED: (June 26, 1984)

/s/
PHILIP M. PRO
United States Magistrate

APPENDIX D

A F F I D A V I T

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, Dennis R. Barton, being first duly sworn, deposes and says:

1. Your affiant is a Special Agent with the Criminal Investigation Division of the Internal Revenue Service, currently assigned to handle this case.

2. On May 23, 1984, a request to address the issues raised by the motion was given me by the United States Attorney, Lamond Mills.

3. On May 23, 1984, an Affidavit was obtained from Retired Special Agent Hugh B. Mays, the former case agent of the Richard M. Mann case, which addressed the issue - the Government's agreement not to prosecute and the granting of immunity to the defendant. (Affidavit)

I.

Before, during and after the interview on May 1, 1980, with a confidential informant (whom the Attorney David T. Spurlock, Jr. represented to be William "Bill" Barnett), no form of immunity or suggestion of immunity was ever offered to the confidential informant in your affiant's presence.

The understanding between the IRS representatives, Special Agent Mays and your affiant, Mr. Spurlock and his client, Mr. Barnett, was that we would interview Barnett only as to his knowledge as to the procedure and activities that had taken place at 50 States. It had been agreed that the informant would not be read his constitutional rights because he was to be questioned as a third party and not as the principal in his own case.

A memorandum of Areas of Questioning was furnished to Mr. Spurlock, per his request, on or about April 21, 1980, as to the areas that we would be directing our questions (Exhibit A). None of the questions asked of the informant during the interview were directly related to how it affected the informant. (See Exhibit B.)

The informant answered all of the general questions asked of him during this interview. His attorney was present at all times that Mr. Barnett was near either Special Agent Mays or myself.

During the interview, Mr. Spurlock appeared to be very careful that Special Agent Mays or myself did not cross over the line of general questions about Mr. Barnett (i.e., Question 58, page 12, Exhibit B).

II.

The investigation of RICHARD M. MANN, a/k/a William "Bill" Barnett, has been a joint investigation with the Examination Division since it was referred from that division on October 3, 1979 (Exhibit C). A Revenue Agent's Report was prepared and submitted for review on June 22, 1981 (Exhibit D). All summons issued were for matter of the tax liability to William "Bill" Barnett (Exhibit D). All documents requested were needed to establish the correct tax due and owing, if any, of Barnett for both criminal and civil purposes. Any difference between what was charged in the criminal adjustments to the civil adjustments are explained in Appendix B-1, B-2, B-3 and B-4 for the years 1976, 1977, 1978 and 1979, respectively, of the special agent's report (Exhibit E & F). All of the major income producing summons

were issued before May 1, 1980, when Barnett was interviewed about 50 States Distributing (i.e., January 14, 1980 for 50 States, etc.).

As Special Agent of the Criminal Investigation Division, it is your affiant's duty to investigate and follow leads that would assist in proving sources of income for any taxpayer; whether or not the source is a legal or illegal income producing source (Sec. 61, IRC of 1954). Part of the allegations about the salesmen and 50 States Distributing as a company were making money through the use of misrepresentation of products over the telephone and receiving payments for the same products via the United States Mail (i.e., mail and/or Postal violations and wire fraud). It was also alleged that certain salesmen and/or managers were supplying spiffs (bonsues) of cocaine for jobs well done. These same individuals were also alleged to be selling

narcotics to other employees of 50 States Distributing Company (therefore, producing income from an illegal business which is taxable income as was their commissions from all the sales they made over the telephone.

Special Agents of the Criminal Investigation Division have the authority to investigate Title 26, United States Code, and Title 18, United States Code and Title 31, United States Code, violations (Exhibit 1 thru G-2). We are also obligated by our manual to pursue non-tax violations and provide that information to the agencies that have jurisdiction. See excerpts of Handbook for Special Agents, Sections 3392, 348.7 and 348.8. (Exhibit H-1 and H-2).

III.

MANN (Barnett) was not advised of his constitutional rights because he was interviewed as a third party with no specific

questions asked of him per the request of his Attorney, David T. Spurlock. No questions and answers taken of Barnett where he could be given his rights and questioned as the principal of the case. (See Memo dated 1/30/80, 2/19/80 and 4/28/80).

At no point in time, was immunity granted to Barnett or suggested that it could be done by the Special Agent.

"Off the record" breaks were taken by mutual request to both Barnett, Spurlock and the special agents but, most of all, for the Stenographer, Mrs. O'Reilly. The "off the record" breaks were at times granted by the Special Agent at the request of Mr. Spurlock to give his client instructions on keeping the information general and not specific about himself.

Finally, the interview referred to above with the defendant, occurred some time after the summons had already been returned.

/s/
DENNIS R. BARTON,
Special Agent
Criminal Investigation
Division
Internal Revenue Service

SUBSCRIBED and SWORN to before me this (29th) day of May, 1984.

/s/
NOTARY

SEAL

JUDITH K. STANLEY
Notary Public-State of Nevada
Clark County

My Appointment Expires Oct 21
1985

APPENDIX E

Internal Revenue Service
MEMORANDUM

date: April 21, 1980

to: Chief, Criminal Investigation Division Las Vegas, Nevada

from: Hugh B Mays, Special Agent
Las Vegas, Nevada CI:02:HBM:do'r

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subject: Areas of Questioning

FIFTY STATES DISTRIBUTORS

The areas of consideration concerning the activities and operations of MAY DISTRIBUTING COMPANY, INC d/b/a/ FIFTY STATES DISTRIBUTORS would include but not be limited to the following:

1. Importation of narcotics
   a. Source of narcotics
   b. Distribution of narcotics
   c. Proceeds of narcotics transactions
   d. Individuals involved
2. Sales via telephones
   a. The general operation

b. How returned sales are disposed of

c. Possible postal violations

3. Was there an income tax conspiracy? Who masterminded scheme?

a. Use of fictitious names

b. Use of fictitious social security numbers

c. Issuance of Forms 1099 and W-2

d. Withholding of taxes vs larger paychecks for salespeople

4. Fraud by wire (telephone)

a. Indications of facts concerning fraud by wire

b. Who commits this fraud

c. Who gives instructions for this fraud by wire

5. Organized Crime Connections:

a. How connected

b. Where are connections

c. Who are connections

6. FIFTY STATES operations including other states

a. Locations

b. Operators

c. What SCHROEDER receives; is this in the form of skimmed receipts?

d. How are books and records consolidated into Las Vegas office

7. Information as to any SCHROEDER connection to Service employees.

/s/
HUGH B MAYS

APPENDIX F

MEMORANDUM OF INTERVIEW

IN RE: FIFTY STATES DISTRIBUTING COMPANY

Date: May 1, 1980

Time: 2:25 PM - 4:50 PM

Place: Office of David T Spurlock, Jr, Attorney First National Bank Building - Suite 10 302 Carson Avenue Las Vegas, Nevada

Present: Confidential Informant

DAVID T SPURLOCK, JR, Attorney

HUGH B MAYS, Special Agent

DENNIS R BARTON, Special Agent

DOROTHY O'Reilly, Shorthand Reporter

Special Agents Mays and Barton presented their credentials to Confidential Informant and his attorney. The following questions were asked by Special Agent Mays, unless otherwise specified, and answers were given by Confidential Informant:

....

BARTON:

31. Q. Operational-wise, do you know of anything he might be doing which is not consistent with postal regulations?

A. Yes, just about everything.

. . .

MAYS:

At this point are some direct questions which relate to him (the informant) but not his taxes ... in the area of what we talked about on the phone this morning.

INFORMANT:

And I will look at DAVE and make sure he wants me to answer.

66. Q. if my understanding is correct, you were fearful of coming in here because someone knew you were coming down to the IRS. Who was this "someone"?

A. Everyone in the whole building.

BARTON:

67. Q. How did they know?

A. How did they know? Very easily. He called ... no name ... He said, "Your meeting with the IRS is on such and such a day." They were tapping the line and heard it.

68. Q. I think you said that RON SCHROEDER even spoke to you about it directly?

A. He mentioned it to me.

69. Q. Could you relate that conversation to us?

A. He said, "I understand you're going down to talk to the IRS." I said, That's right. We're trying to get the thing settled so it doesn't hang on for years and years and years."

SPURLOCK:

70. Q. Did he make representations to you,

"Don't worry about it. I'll take care of it."?

A. He said to me before I got in touch with you ... "FREDDIE DAVIDSON is my very, very close friend. No more than I would let anything happen to him, I assure you nothing is going to happen to you." What he was referring to is not that I wouldn't have to pay my back taxes, but that I wouldn't end up in jail over this.

71. Q. Did you every have any other discussions with him concerning how he might accomplish this?

A. No, sir.

BARTON:

72. Q. Do you know, or have you heard whether or not SCHROEDER has contacts in the IRS where he could help fulfill that promise?

A. No. I mean, I've heard, not directly through him, but I have heard rumors he does have a contact with the IRS. Not that I'm worried about him fulfilling his promise; I am worried about him finding out about this.

73. Q. When you say you were fearful of coming in, what was your fear of?

A. Fear of what he might do to me if he found out I was talking about his company and him to you.

74. Q. What do you feel he might do to you?

A. Anything from shooting me to arranging an accident for me, or anything.

SPURLOCK:

75. Q. At one time didn't you have a discussion with one of the employees where there were some overt threats?

A. Overt threats? No, I can't say.

SPURLOCK:

76. Q. Maybe that was when they were saying it was at their direction you were doing certain things?

A. You mean threats, as far as being fired?

SPURLOCK:

77. Q. No. But I'm thinking that Hugh was concerned with ... I think he was referring to ... I thought at one time you had a discussion with one of your supervisors ...

A. They told me it would be very unhealthy to talk to the IRS, but no more than it would be unhealthy to do anything against RON SCHROEDER and his company.

BARTON:

78. Q. Who told you that?

A. Who, specifically? The name?

BARTON:

79. Q. Yes.

. Oh ... I think it was DAVE RICHARDSON who said that. The incident doesn't really stand out that much in my mind.

(MAYS):

80. Q. Do you feel or believe that other employees or salesmen at FIFTY STATES are under the same impression of fear from SCHROEDER that you are?

A. Oh, surely.

81. Has he ever tried tomake it known that this would happen?

A. Personally?

82. Q. Personally, or through the inner circle.

A. No. I don't really think particularly that way. It's just like if I told you I was going to turn you in to the FBI, you might have someone come tell me

that wouldn't be a healthy thing to do. I'd better get more life insurance than I have. I have never been outright threatened by RON SCHROEDER or anyone else in that company, for the reason we're here. I've been threatened, but not for taxes.

83. Has it been implied?

A. Yes, it has been implied previously.

. . .

BARTON:

109. Q. We had one area we place in rather high esteem. Number One on our list that we wanted to look into. That was the area of narcotics, and the sub-area that we have listed on our letter. First of all, how available were drugs at FIFTY STATES during those three years, initially?

A. They have become more and more prevalent over there. I think you guys think

there are some big dealers over there, but to my knowledge there are not.

. . .

SPURLOCK:

118. Q. Specifically, do you know of any sales managers who offered a "spiff" to independent salesmen of a gram of coke if they did a certain amount of business?

A. No, sir. I don't know ... I will say, no one has ever offered me that. I don't mess around with that shit; it wouldn't improve my sales a bit. They would be better off to offer me $100.

. . .

122. Q. Before he left, would you know if he did or did not use cocaine?

A. I don't know; but I know he was busted for possession of cocaine last year, I believe.

. . .

BARTON:

141. Do you have any knowledge of any ties SCHROEDER may have with any Organized Crime figures?

A. No, to my knowledge, no. However, again, I wouldn't be surprised.

. . .

I, Dorothy O'Reilly, Shorthand Reporter, do hereby certify that I took the foregoing statement in shorthand, personally transcribed it from my shorthand notes, and initialed each page.

/s/ (Dorothy O'Reilly)
Shorthand Reporter
Internal Revenue Service

HUGH B MAYS,
Special Agent
Internal Revenue Service

/s/ (Dennis R. Barton)
DENNIS R BARTON, Special Agent
Internal Revenue Service

APPENDIX G

. . .

9211 (8-8-80)

General

(1) The investigative jurisdiction of Criminal investigation extends to any and all alleged or suspected violations of the internal revenue laws that are punishable as crimes with the following exceptions:

....

(b) The following violations within the investigative jurisdiction of the Internal Security Division of Inspectors:

1 Conduct violations by IRS personnel (RC 7214). (See also IRM 9143.4)

2 Unauthorized disclosure of Federal tax information by Federal or State employees, corporate shareholders, document reproducers, and others (IRC 7213).

. . .

APPENDIX H

LAMOND R. MILLS
United States Attorney
BOOKER T. EVANS
Assistant United States Attorney
300 Las Vegas Boulevard South
Las Vegas, Nevada 89101-0030
(702) 388-6336

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

-oOo-

UNITED STATES OF AMERICA,	) Cr. LV 84-406
Plaintiff,	) VIOLATION:
	) 18 U.S.C. §1341
vs.	) - Fraud by Mail;
	) 18 U.S.C. §1343
RONALD T. SCHROEDER,	) - Fraud by Wire;
	) 18 U.S.C. §2 -
Defendant.	) Aiding and Abetting

I N D I C T M E N T

COUNT I
(Mail Fraud; Aiding and Abetting)

The Grand Jury charges: THAT

1. During the period from on or about July 8, 1974, through on or about February 18, 1982, within the Federal District of

Nevada and elsewhere, defendant RONALD T. SCHROEDER devised and ntended to devise a scheme and artifice to defraud small businesses throughout the United States and elsewhere and to obtain money by means of false and fraudulent pretenses, representations and promises, through in part, the use of the mails to convey advertising specialty products, premium gifts, United Postal Service money orders, credit memos, and other correspondence, while knowing at the time the said pretenses, representations and promises were false and fraudulent when made.

2. The object of defendant SCHROEDER'S illegal scheme and artifice to defraud were accomplished in substance as follows:

a. During the period from on or about July 8, 1974, through February 18, 1982, the defendant operated and controlled within the District of Nevada various

advertising specialty businesses including but not limited to May Distributing, Inc.; 50 State Distributing, Inc.; Nationwide Distributing, Inc.; and American Syndicated Marketing, Inc.

b. The defendant rented business suites and offices and warehousing facilities throughout the city of Las Vegas wherein management, in-house sales personnel, reload sales personnel, verifiers, customer service representatives, production personnel, shipping personnel, and bookkeeping personnel were employed.

c. In furtherance of his scheme to defraud, the defendant caused telephones to be installed at his various office suites, sales offices, verification offices, and customer service offices, including wide area telephone service, to be used in contacting prospective victims nationwide in order to make sales,

verify sales and to lull and placate victims through a self-proclaimed customer service department.

d. The defendant would and did cause to be opened numerous commercial checking accounts, stock brokerage accounts, savings accounts at various banks and financial institutions located throughout Nevada and California as respositories for monies received from businesses nationwide.

e. The defendant in order to expand and increase the income from his scheme and artifice to defraud advertised for experienced telephone solicitors and other personnel in newspapers circulated throughout Las Vegas and the United States.

f. The defendant hired "independent contractors" on a commission basis to telephone small businessmen located throughout the United States to secure

the sale of inferior quality and over-priced advertising speciality products.

g. To further his scheme to defraud, the defendant and his solicitors communicated by telephone and by mail with various small businesses located throughout the United States, using pertinent infromation printed in various lead source material, such as telephone directories, Dunn & Bradstreet cards, mailing lists, and prior sales orders.

h. The defendant caused to be drafted and utilized numerous "sales presentations" or "pitch sheets" to be used by his salesmen in soliciting the sale of inferior, overpriced advertising speciality products to small businesses located through the United States.

i. The defendant's telephone solicitors used false and fictitious personal names and titles such as Owner, National

Promotions Director, etc., for the purpose of deceiving victims into believing they were speaking with a person in some authority at 50 State Distributing, et. al.

j. The defendant caused to be represented to various small businesses that the advertising specialty products they would receive via the United States mail would establish and enhance their business image within their own local community, when, in fact, such advertising specialty products were of such poor quality, that in many instances, they were never distributed by the victim company.

k. The defendant purchased and caused to be purchased premium gifts and advertising specialty products in mass quantities which were later sold to small businesses at prices far exceeding their

actual worth.

1. To effect the scheme to defraud, the defendant would and did seek to obtain money from small businesses through false, fraudulent and misleading representations, pretenses and promises and omissions including, but not limited to, the following:

(1) That the defendant operated a bonafide advertising specialty business which sold products at promotion, discount, clearance, and retail prices.

(2) That in 1980, the defendant and his companies did over $27,000,000 worth of business with major corporations - the Exxons, General Electric and General Motors type companies, but decided in 1981 to budget $1,500,000 for the purchase of premium gifts to be given away to the smaller businesses of America.

(3) That the defendant's telephone solicitors were: the owner, national promotion's director, with the catalog division, sone of the owner, production manager, in charge of public relations, vice president, etc., of the particular advertising business they were calling from.

(4) That the defendant randomly selected a small number of businesses by computer as "guaranteed award winners."

(5) That the defendant's advertising specialty firms awarded small businesses one-third karat uncut diamonds on 24 karat, gold-plated necklaces of investment quality.

(6) That the defendant's companies manufactured and sold money clips which retailed for $50 in Playboy magazine.

(7) That the defendant's six-piece steak knife set was made by Sheffield of England and was worth nearly $100 per set.

(8) That the defendant's companies awarded Louis De Jour French perfume in 2 ounce crystal bottles valued at $80.

(9) That the defendant's companies distributed advertising specialty products imprinted with the purchaser's name at trade shows in the purchaser's locality.

(10) That the defendant insured COD packages due to the value of the prizes and products being shipped.

(11) That the purchasers were one of five regional winners of American Pen's Million and a Half Dollar Sweepstakes Contest.

(12) That the defendant attached a free gift certificate to their 1981 catalogs for a 1/3 karat, uncut diamond or 7-function, wrist computer, LCD watch.

(13) That the defednant sold his merchandise at 10% over his cost and not at the wholesale or retail price.

(14) That the defendant sold his advertising specialty products below wholesale and retail prices in order to clear out his warehouses to avoid the Nevada State Inventory Floor Tax.

(15) That the defendant's watches normally retail for $129 a piece.

(16) That the changes of winning a gift valued at $1,250 appearing on Page 4 of the defendant's "Diamond Jubilee Award Catalog" were one in fourteen.

(17) That the defendant's solicitors had found in their warehouse some

already printed up advertising specialty products comprising the balance of the merchandise to be shipped to the customer at an additional COD charge.

m. The defendant would and did cause to be mailed COD packages containing advertising speciality products and premium gifts of a lesser quality than promised to the previously solicited and verified customers.

n. The defendant would and did employ the United States Postal Service COD system, which does not allow recipients of COD articles to open and inspect parcels prior to payment, to deliver and make collections of payments for the defendant, and issued and mailed United States Postal Service money orders through the United States Postal Service to the defendant, who could and did convert the proceeds of the money orders,

in part, to his own use.

o. The defendant would and did cause his sales persons and "reload" personnel to recontact over the telephone small businesses that had previously paid for COD packages and further caused them to fraudulently represent to the businessmen that the balance of their initial order was located in their warehouse and was ready for shipment.

p. The defendant created a sham customer service department, staffed with former sales personnel and telephone verifiers to further his scheme to defraud, lull customers, forestall complaints to authorities, and to attempt to resell and reship packages which had been sent back to the defendant's companies.

3. On or about August 26, 1981, in the District of Nevada, for the purpose of

executing the aforesaid scheme and artifice to defraud and attempting to do so, RONALD T. SCHROEDER, knowingly and willfully caused to be placed in an authorized depository for mail matter at Las Vegas, Nevada, COD Article No. U-242086, containing advertising specialty pens and a "prize" from 50 State Distributing company, Inc., 3044 South Highland Drive, Las Vegas, NV 89109 to Dorothy Schank, Park City Cafe, 104 North Clark, Park City, MT 59063; all in violation of Title 18, United States Code, Sections 1341 and 2.

COUNT II

(Wire Fraud; Aiding and Abetting)

The Grand Jury further charges: THAT

1. The Grand Jury realleges all of the allegations in Count I of this Indictment except those contained in the last paragraph thereof and further alleges that:

2. On or about September 21, 1981, in Clark County, within the District of Nevada, defendant RONALD T. SCHROEDER, for the purpose of executing a scheme and artifice to defraud, and attempting to do so, knowingly caused to be transmitted in interstate commerce by means of wire communication, a telephone call to James Gordon, Gordon Used Cars, Highway 315 West, Water Valley, Mississippi, at telephone number (601) 473-3001; all in violation of Title 18, United States Code, Sections 1343 and 2.

A TRUE BILL.

/s/
FOREPERSON OF THE GRAND JURY

LAMOND R. MILLS
United States Attorney